

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JAMES RAY, *et al.*, : 3:16-cv-364
Plaintiffs, : Case No.
v. : JUDGE WALTER H. RICE
CALIBER HOME LOANS, INC., *et* : MAGISTRATE JUDGE
al., : MICHAEL R. MERZ
Defendants.

DECISION AND ENTRY ADOPTING IN PART AND REJECTING IN PART REPORT AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE (DOC. #29); DEFENDANT NATIONSTAR MORTGAGE, LLC'S FED. R. CIV. P. 12(b)(6) MOTION TO DISMISS (DOC. #10) IS SUSTAINED; PLAINTIFFS JAMES RAY AND PATRICIA RAY'S CLAIMS OF FRAUD (COUNT I) AND VIOLATION OF OHIO REVISED CODE § 1923.05 (COUNT III) AGAINST NATIONSTAR ARE DISMISSED WITH PREJUDICE; PLAINTIFFS' CLAIM OF VIOLATION OF OHIO REVISED CODE §2329 (COUNT IV) IS DISMISSED WITHOUT PREJUDICE; JUDGMENT SHALL ULTIMATELY ENTER IN FAVOR OF NATIONSTAR AND AGAINST PLAINTIFFS ON COUNTS I AND III

In their Complaint, *Pro se* Plaintiffs James Ray and Patricia Ray ("Plaintiffs") have raised claims of fraud (Count I) and violations of Ohio Revised Code §§ 1923.05 and 2329 (Counts III and IV, respectively)) against Defendant Nationstar Mortgage, LLC's ("Nationstar"). Doc. #2. Nationstar has filed a motion to dismiss. Doc. #10. The Court has reviewed the Report and Recommendations of Magistrate Judge Michael R. Merz, Doc. #29, to whom this case is referred pursuant to 28 U.S.C. § 636. Further, the Court notes that no objections have been filed thereto, and that the time for filing such objections under Rule 72(b) has expired. Based upon the reasoning and citations of

authority set forth in the Report and Recommendations, as well as upon a thorough *de novo* review of the entirety of the Court's file and the applicable law, this Court hereby ADOPTS IN PART AND REJECTS IN PART said Report and Recommendations.

For the reasons set forth in the Report and Recommendations, the Court adopts the recommendations that Count I be dismissed with prejudice as barred by *res judicata*, and that Count IV be dismissed without prejudice for failure to state a claim. Doc. #29, PAGEID #216. However, with respect to Count III, the Magistrate Judge concluded that "Ohio Revised Code § 1923.05 does not, expressly or by implication, create a cause of action[.]" *Id.*, PAGEID #213, yet recommended dismissal of that claim without prejudice. *Id.*, PAGEID #216. The Court agrees with the Magistrate Judge's conclusion, but disagrees with his recommendation. The Court is cognizant of the need to construe *pro se* complaints liberally. *Williams v. Curtin*, 631 F.3d 380, 383 (6th Cir. 2011). However, because Plaintiffs have no right of action under Ohio Revised Code § 1923.05, it is axiomatic that they cannot set forth a plausible claim for relief under that section. Thus, any renewed claim would not survive a motion to dismiss, leave to amend would be futile, and Plaintiffs' Count III must be dismissed with prejudice. See, e.g., *SFS Check, LLC v. First Bank of Delaware*, 774 F.3d 351, 355 (6th Cir. 2014) (citations omitted) ("courts need not give leave to amend when doing so would be futile. Amending would be futile if a proposed amendment would not survive a motion to dismiss.").

Accordingly, the Report and Recommendations of the Magistrate Judge, Doc. # 29, are ADOPTED IN PART AND REJECTED IN PART, and Defendant Nationstar Mortgage, LLC's Fed. R. Civ. P. 12(b)(6) Motion to Dismiss, Doc. #10, is SUSTAINED.

Plaintiffs' claims of fraud (Count I) and violation of Ohio Revised Code § 1923.05 (Count III) against Nationstar are DISMISSED WITH PREJUDICE. Plaintiffs' claim that Nationstar violated Ohio Revised Code § 2329 (Count IV) is DISMISSED WITHOUT PREJUDICE. Judgment shall ultimately enter in favor of Nationstar and against Plaintiffs on Counts I and III.¹

Date: December 30, 2016



WALTER H. RICE
UNITED STATES DISTRICT JUDGE

¹ The Court notes that Plaintiffs have already filed a Motion for Leave to Amend Complaint, Doc. #34, which the Magistrate Judge overruled. Doc. #41.